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NO. 94-2034

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

VERSUS

JERRY YOUNG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT
COURT OF APPEAL

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioner, Empresa Nacional Siderurgica, S.A. (ENSIDESA), suggests that the issue presented by its petition is whether the amended decision of the Louisiana Fourth Circuit Court of Appeal constitutes a proper response to the writ of certiorari issued by this Court.

Respondent respectfully suggests that the court of appeal's original and amended decisions as to the liability of ENSIDESA are entirely consistent with this Court's pronouncements in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and that ENSIDESA's petition for a writ of certiorari herein should be denied.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Respondent, Jerry Young, a longshoreman, brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking damages for injuries he sustained while offloading steel beams from a vessel, the M/V LORENA, in the Port of New Orleans, Louisiana. The defendants were Empresa Nacional Siderurgica, S.A. (ENSIDESA), a Spanish steel manufacturer that had acted both as the loading stevedore of the cargo in Aviles, Spain, and the charterer of the vessel for the voyage from Spain to New Orleans, and Armadores de Cabotaje, S.A. (ARCASA), the owner and operator of the vessel. The plaintiff claimed that defendant ARCASA was liable for negligence under section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*; 33 U.S.C. § 905(b), hereinafter referred to as "905(b)." The plaintiff

claimed that defendant ENSIDESA was liable in two capacities: first, as the stevedore that had loaded the vessel, it was liable for negligence under the general maritime law; and second, as charterer of the M/V LORENA, it was liable under 905(b), also.

The matter went to trial in May 1989, and the jury returned a verdict in favor of Mr. Young against ENSIDESA in its capacity both as the loading stevedore and as charterer of the vessel.[1]

The matter was appealed to the Louisiana Fourth Circuit Court of Appeal, which affirmed the judgment against ENSIDESA both in its role as charterer of the vessel and in its role as loading stevedore, holding as follows:

> Based upon the evidence, we are unable to say that the jury would have been clearly wrong to conclude

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[1]At the time of trial ENSIDESA made no objections to the Court's jury instructions as to its duties as loading stevedore under the general maritime law.

> that a "reasonable ... time charterer would have perceived the dangers presented by the [stow]." [Citation omitted.] In addition, ENSIDESA, as loading stevedore, clearly bears responsibility for the dangerous condition presented by the beams which it stowed. ENSIDESA breached its duty of reasonable care under all of the circumstances, in failing to load the vessel so that it could be offloaded with reasonable safety.

Young v. Armadores de Cabotaje, S.A., 617 So. 2d 517, 528-29 (La. App. 4th Cir. 1993).

ENSIDESA timely filed a writ of certiorari with the Louisiana Supreme Court. On October 1, 1993, the court denied ENSIDESA's writ application. *Young v. Armadores de Cabotaje, S.A.*, 625 So. 2d 170 (La. 1993).

ENSIDESA next filed a petition for writ of certiorari with the United States Supreme Court, making the sole allegation of error that the application of Louisiana Code of Evidence article 606 B to prohibit judicial consideration of jury affidavits allegedly showing racial bias and prejudice against

ENSIDESA denied ENSIDESA due process of law[2]. On February 22, 1994, ENSIDESA's petition for writ of certiorari was denied. *Empresa Nacional Siderurgica, S.A. v. Young*, 114 S. Ct. 1067 (1994).

Following the denial of ENSIDESA's petition for writ of certiorari by the United States Supreme Court, ENSIDESA took no further action. Specifically, ENSIDESA did not file a petition for rehearing pursuant to United States Supreme Court rule 44.2.

Later, after the 25-day period for filing for rehearing had elapsed, the United States Supreme Court granted the petition for a writ of certiorari applied for by ENSIDESA's co-defendant, ARCASA. *Armadores de Cabotaje, S.A. v. Young*, ___ U.S. __, 114 S. Ct. 2701, 129 L. Ed. 2d 830 (1994). In

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[2]Since no argument was made concerning ENSIDESA's liability under the general maritime law as loading stevedore, the holding by the court of appeal is the law of the case and should not be subject to review now. *See infra* pp. 12-13.

granting ARCASA's writ, Your Honors vacated the judgment of the Louisiana Fourth Circuit Court of Appeal (*Young v. Armadores*, 617 So. 2d 517) and remanded for further consideration in light of your opinion in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. _____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994).

Since *Howlett v. Birkdale Shipping Co., S.A.*, dealt solely with the liability of a vessel pursuant to 905(b) and in no way addressed the question of the liability of a stevedore for negligent loading of cargo, ENSIDESA'S liability for negligence as the stevedore that had loaded the steel cargo on the M/V LORENA could not have been, and was not, affected by Your Honors' order. In its amended decision the Louisiana Fourth Circuit Court of Appeal reversed its decision as to the liability of ARCASA under 905(b) but affirmed the liability of ENSIDESA both under

905(b) and for negligence as the loading stevedore, holding as follows:

> **ENSIDESA, both the time-charterer of the vessel and the loading stevedore, is solely and directly responsible for the dangerous condition presented by the cargo which it alone stowed on the M/V LORENA.**

Young v. Armadores de Cabotaje, S.A., 645 So. 2d 1266, 1269 (La. App. 4th Cir. 1994) (bold added).

ENSIDESA's petition for a writ of certiorari to the Louisiana Supreme Court was denied, *Young v. Armadores de Cabotaje, S.A.*, 650 So. 2d 1185 (La. 1995), and this petition followed.

SUMMARY OF ARGUMENT

In both its original and amended opinions, the Louisiana Fourth Circuit Court of Appeal held that the jury had properly found ENSIDESA liable both in its role as the stevedore that had negligently loaded the M/V

LORENA and as the time-charterer of the vessel. ENSIDESA argues that the court of appeal erred in finding it liable as the charterer of the vessel under 905(b) and completely glosses over its liability as loading stevedore. Because ENSIDESA here actually created the hazardous condition by its negligent stowage of the cargo in Aviles, Spain, the Louisiana Fourth Circuit Court of Appeal's decision holding it liable under 905(b) is entirely consistent with Your Honors' opinion in *Howlett*, 512 U.S. _____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and the Ninth Circuit Court of Appeals' opinion in *Riggs v. Scindia Steam Nav. Co. Ltd.*, 35 F.3d 1466 (9th Cir. 1994). Moreover, since ENSIDESA here was negligent in its role as loading stevedore, its liability in that capacity is unaffected by 905(b).

ENSIDESA'S WRIT APPLICATION SHOULD BE DENIED

ENSIDESA argues that the decision below is in conflict with the United States Supreme Court's decision in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and the decision of the Ninth Circuit Court of Appeals in *Riggs v. Scindia Steam Nav. Co., Ltd.*, 35 F.3d 1466 (9th Cir. 1994). But this is not the case.

In *Howlett* the Supreme Court made clear that under 905(b) the vessel's turnover duty to warn "encompasses only those hazards that 'are known to the vessel or should be known to it in the exercise of reasonable care.' [Citation omitted.]" 512 U.S. at ___, 114 S. Ct. at 2067. Rejecting cases holding that the vessel had a duty to know of hazards created during loading operations, the Supreme Court concluded that "the exercise of reasonable care does not require the

shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow." *Howlett*, 512 U.S. at _____, 114 S. Ct. at 2067.

In *Riggs. v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), the plaintiff's sole contention against the vessel under 905(b) "consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore." 8 F.3d at 1443. Accordingly, on remand, after *Howlett*, the Ninth Circuit held that the district court had correctly granted summary judgment since the vessel owner could not be held liable under 905(b) for failing to supervise the cargo loading operations of a third-party stevedore. *Riggs* v. Scindia Steam Nav. Co., 35 F.3d 1466 (9th Cir. 1994).

But here the claim against ENSIDESA is entirely different because ENSIDESA itself

(not an independent stevedore) failed to properly conduct (not supervise) cargo loading operations. ENSIDESA's liability was founded on its own negligent stowage of the cargo, and not upon the negligence of another party.

Further, ENSIDESA suggests that, after *Howlett,* it cannot be liable under 905(b) for creating a dangerous condition because the danger was "open and obvious." But this has never been the law. Rather, *Scindia Steam Nav. Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981), and *Howlett* both merely limited the vessel's duty to warn of dangerous conditions to those dangers that were latent and not obvious. But here the Louisiana Fourth Circuit Court of Appeal's finding of liability against ENSIDESA was founded upon its negligence in creating the dangerous stow, and not upon its failure to warn.

Finally, ENSIDESA would seemingly suggest that Your Honors' conclusions as to the scope of duties under 905(b) in *Scindia* and *Howlett* would apply to limit not only its liability as vessel owner, but also its liability as an onloading stevedore under the general maritime law. This argument should be rejected for three reasons.

First, ENSIDESA has not properly reserved this issue for review. At trial ENSIDESA accepted without objection the court's jury instructions as to its duties under the general maritime law. Like rule 51 of the Federal Rules of Civil Procedure, Louisiana's Code of Civil Procedure article 1793 C requires that an objection to a jury instruction be made in order to preserve the claim for appellate review. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466 (La. App. 1st Cir. 1994). Further, in ENSIDESA's first appeal, its first writ to the Louisiana Supreme Court, and its first

petition here, ENSIDESA never raised any issue with respect to the jury's finding of liability based upon the general maritime law. Your Honors have previously held that the Supreme Court will not ordinarily decide questions not raised in the lower courts, especially where the party alleging error has failed to object to jury instructions in the trial court. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 107 S. Ct. 1114 (1987). This rule should certainly apply here.

A second reason to reject ENSIDESA's argument is that the court of appeal's first decision holding ENSIDESA liable under the general maritime law is now the law of the case.

> An appellate court decision rendered at one stage of a case constitutes the "law of the case" in all succeeding stages. The first appellate opinion "'establishes the law which other courts owing obedience to it *must* and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case.'" The scope of the doctrine, however, is limited: It "applies

> only to issues that were decided in the former proceeding and does not pertain [to] questions that might have been decided but were not."

Knotts v. United States, 893 F.2d 758, 761 (5th Cir. 1990) (footnotes omitted).

Courts apply the law of the case for several reasons:

> The avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of the matter at issue.

Day v. Campbell-Grosjean Roofing & Sheet Metal Corp., 256 So. 2d 105, 107 (La. 1971).

Here, fairness should require that the doctrine be applied. ENSIDESA had the opportunity to raise this issue on its first appeal and did not do so. Nor did it raise this issue in the Louisiana Supreme Court or in its first petition to this Court.

A third reason Your Honors should reject ENSIDESA's argument that *Howlett* changed <u>the</u>

law with respect to the duties of a loading stevedore vis-a-vis an offloading stevedore is that there is nothing in the decision to suggest such an intent.

Precisely this issue was considered by the United States Fifth Circuit Court of Appeals in *Couch v. Cro-Marine Transport, Inc.*, 44 F.3d 319 (5th Cir. 1995). In *Couch*, the plaintiff, an employee of the offloading stevedore, sued a loading stevedore, NOSC, for alleged negligence in the stowage of steel cargo. After a verdict in the plaintiff's favor, the loading stevedore appealed and argued that it could not be liable under 905 B because "its stow constituted an open and obvious condition, therefore not triggering a breach of the first *Scindia* duty to warn of hidden defects." 44 F.3d at 324. The court of

appeal rejected the loading stevedore's argument, reasoning as follows:

> *Scindia* and *Howlett* are section 905(b) cases brought against shipowners and do not support [the loading stevedore's] contention that the *Scindia* standard should apply in this case, a negligence suit under the general maritime law against a party other than the vessel owner.

Couch, 44 F.3d at 325.

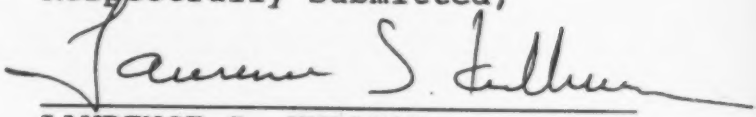
The Fifth Circuit then held that the duty of a loading stevedore is to load the cargo so that an expert and experienced stevedore will be able to discharge a cargo with reasonable safety and affirmed the district court's judgment in the plaintiff's favor. *Couch*, 44 F.3d at 327. The same rule should apply here. The duty of reasonable care owed by Ensidesa as a foreign loading stevedore is unaffected by 905(b), Scindia or Howlett, and the Louisiana court of appeal's decision so holding is correct.

CONCLUSION

As loading stevedore, ENSIDESA's duties were not limited by 905(b), and the court of appeal's holding as to ENSIDESA's liability in that role is entirely correct. Further, since the court of appeal's holding as to ENSIDESA as vessel charterer is based upon ENSIDESA's conducting of the cargo loading operation (and not the supervision of the operations of a third party), its holding is likewise correct under 905(b). *Scindia Steam Nav. Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981); *Howlett,* 512 U.S. ___, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994).

For these reasons, we respectfully suggest that Your Honors deny ENSIDESA's petition for writ of certiorari.

Respectfully submitted,



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